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In the Supreme Court of the United States

OCTOBER TERM, 1987

ARGENTINE REPUBLIC, PETITIONER

v.

AMERADA HESS SHIPPING CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
SUPPORTING PETITIONER

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QUESTION PRESENTED

The United States will address the following question:

Whether a federal district court has jurisdiction under the Alien Tort Statute, 28 U.S.C. 1350, over a suit brought by a foreign corporation against a foreign state for a tort allegedly committed on the high seas in violation of international law, where the foreign state is immune from the jurisdiction of the courts of the United States under the Foreign Sovereign Immunities Act (FSIA).

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INTEREST OF THE UNITED STATES

Respondents brought this suit seeking money damages for losses sustained as a result of an attack by military aircraft of petitioner Argentine Republic on a tanker owned by respondent United Carriers, a Liberian Corporation, when the tanker was on the high seas in the South Atlantic during the war between Great Britain and Argentina regarding the Falkland (Malvinas) Islands. Under the Foreign Sovereign Immunities Act (FSIA), petitioner Argentine Republic is immune from the jurisdiction of the courts of the United States and the States with respect to any suit arising out of that incident, because neither the acts alleged nor the damage to property occurred in the United States. The court of appeals held, however, that irrespective of any immunity mandated by the FSIA, respondents may bring this action against Argentina for damages under the Alien Tort Statute, 28 U.S.C. 1350, which provides that the district courts shall have jurisdiction over any suit by an alien for a tort in violation of the Law of Nations. This holding is clearly wrong,

because the FSIA, by its terms, is the exclusive means for determining when a United States court may exercise jurisdiction over a suit against a foreign state.

The United States has a substantial interest in the proper interpretation of the FSIA, because the implementation of the FSIA by the courts may affect the foreign relations of the United States. The FSIA was enacted in 1976 to codify what Congress and the President found to be the appropriate principles of international law regarding the circumstances in which one sovereign state should be immune from the jurisdiction of the courts of another sovereign state. Therefore, when a United States court refuses to accord a foreign state the immunity to which it is entitled by the FSIA, the court departs from the principles of international law that have been formally adopted by the political Branches. Moreover, the holding of the court of appeals in this case threatens to open the courts of the United States to aliens (but not U.S. citizens) who seek damages for alleged violations of international law by foreign governments—even where the underlying dispute has no nexus to the United States. Subjecting foreign states to the jurisdiction of the courts of the United States in such cases could have serious adverse consequences for the Nation's foreign relations and could expose the United States to reciprocal action in the courts of other nations. The United States has a substantial interest in preventing those consequences.

STATEMENT

1. The petition for a writ of certiorari in this case arises out of two consolidated suits seeking damages from petitioner Argentine Republic for the loss of a crude oil tanker named the *Hercules*. Respondent United Carriers, Inc., a Liberian corporation, was the owner of the *Hercules*. Respondent Amerada Hess Shipping Corp., also a Liberian corporation, had chartered the *Hercules* to transport crude oil from Valdez, Alaska, to an oil refinery in the Virgin Islands. Because the ship was too large to pass through the Panama Canal, it sailed between these two points by travelling around the southern tip of South America, at Cape Horn. Pet. App. 3a, 26a-27a.

On May 25, 1982, the *Hercules* began a return voyage, without cargo, from the Virgin Islands to Valdez. At that time, Argentina and Great Britain were at war over the Falkland (Malvinas) Islands. On June 8, 1982, while the *Hercules* was on the high seas in the South Atlantic, and allegedly was outside any claimed "war zones" designated by Argentina and Great Britain, it was attacked by Argentine military aircraft. The decks and hull of the ship were damaged, and an undetonated bomb lodged in her starboard side. Respondent United Carriers decided that it would be too dangerous to attempt to remove the undetonated bomb, and the ship therefore was scuttled off the coast of Brazil. Pet. App. 4a, 27a-28a.

2. Respondents filed suit in the United States District Court for the Southern District of New York seeking money damages from petitioner Argentine Republic for the injuries they sustained as a result of the attack.¹ Respondents alleged that petitioner's attack on the neutral vessel violated established norms of international law, and they invoked the jurisdiction of the district court under the Alien Tort Statute, 28 U.S.C. 1350, which provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." Pet. App. 28a, 36a, 38a, 39a, 41a.

The district court granted petitioner's motion to dismiss the complaint, holding that respondents' suits are barred by the Foreign Sovereign Immunities Act of 1976 (FSIA).² See Pet. App. 25a-35a. In enacting the FSIA, Congress rejected the rule of absolute immunity for foreign sovereigns that had been recognized since the earliest days of the Nation (see *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812)), and instead codified the "restrictive" theory of

¹ Respondent United Carriers sought \$10 million in damages for the loss of the ship, and respondent Amerada Hess sought \$1.9 million in damages for the loss of fuel that went down with the ship. Pet. App. 4a.

² Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. 1330, 1391(f), 1602 et seq.).

sovereign immunity that was followed by many other nations and had been adopted by the Executive Branch in 1952 in the so-called Tate Letter. Under the restrictive theory, a foreign state is immune from suit for its sovereign or public acts, but not for its commercial or private acts. 28 U.S.C. 1602; see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983); H.R. Rep. 94-1487, 94th Cong., 2d Sess. 8-9, 14 (1976); S. Rep. 94-1310, 94th Cong., 2d Sess. 9, 10 (1976).

In the district court's view, Congress was "emphatic" in its purpose that "the FSIA be the sole means of assessing claims of immunity" by a foreign state (Pet. App. 29a). The court found this congressional purpose "apparent" from the text of the Act, which provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter" (Pet. App. 29a (quoting 28 U.S.C. 1604)),¹ and from the legislative history, which states that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts" (*id.* at 29a, quoting H.R. Rep. 94-1487, 94th Cong., 2d Sess. 12 (1976)). Looking then to the exclusive standards of the FSIA, the district court concluded that "[respondents'] claims undeniably fall outside of the exceptions to blanket foreign sovereign immunity provided by the FSIA" (Pet. App. 30a). The court reasoned that in order for a foreign state to be denied immunity from a suit sounding in tort, the FSIA "requires that the 'damage to or loss of property' occur 'in the United States'" (*ibid.*, quoting 28 U.S.C. 1605(a)(5)); yet in this case, respondents "can claim no loss whatsoever occurring in the United States" (Pet. App. 30a).

The district court also rejected respondents' contention that the Alien Tort Statute "provides the basis for jurisdiction that the FSIA denies" (Pet. App. 31a). The court noted that "[n]o case law supports the assertion that a foreign sovereign state

¹ Section 1604 makes this general conferral of immunity "[s]ubject to existing international agreements to which the United States is a party at the time of enactment of [the FSIA]." As explained below, this exception is inapplicable here. See note 6, *infra*.

would not have enjoyed immunity in 1789," when the Alien Tort Statute was enacted (*id.* at 31a-32a). But the court found that even if a foreign sovereign could have been sued under the Alien Tort Statute if that Statute were considered in isolation, the FSIA now confers sovereign immunity on a foreign state as regards any such suit unless the suit falls with one of the exceptions to immunity under the FSIA (*id.* at 32a-33a). The court stressed that its conclusion was not based on the premise that the enactment of the FSIA in 1976 had effected a "repeal" of the Alien Tort Statute. In the court's view, because the Alien Tort Statute "speaks in terms of plaintiffs and causes of action" and "is utterly silent as to classes of defendants," the FSIA merely "narrows the class of defendants" who might otherwise be sued under the Alien Tort Statute, just as it does with respect to the defendants who might be sued under the other jurisdictional provisions in the Judicial Code (*ibid.*).

3. a. A divided panel of the court of appeals reversed and remanded for further proceedings (Pet. App. 1a-21a). The court of appeals held that the district court has jurisdiction over the case under the Alien Tort Statute (*id.* at 7a-10a), because the suit is brought by aliens (the respondent Liberian corporations), it sounds in tort ("the bombing of a ship without justification"), and it alleges what the court found to be a violation of international law ("attacking a neutral ship in international waters, without proper cause for suspicion or investigation") (*id.* at 7a-8a). The court acknowledged petitioner Argentina's submission that the Alien Tort Statute provides jurisdiction only over suits against individuals, not sovereign states, because the United States recognized absolute sovereign immunity for foreign states in 1789, when the Statute was enacted. But the court found it unnecessary to decide whether a court faced with the circumstances of this case in 1789 would have exercised jurisdiction over a foreign state. In the court's view, the Alien Tort Statute "is no more than a jurisdictional grant based on international law," and "[i]n construing the Alien Tort Statute, 'courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world

today' " (*id.* at 8a-9a, quoting *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980)). Accordingly, the court concluded that it "must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign" (Pet. App. 9a). Citing two law review articles, the court concluded that the "modern view" is that sovereigns are not immune from suit for their violations of international law (*ibid.*).

The court rejected Argentina's contention that, regardless of whether the Alien Tort Statute, standing alone, would have provided a basis for jurisdiction in this case, the FSIA is now the exclusive basis for obtaining jurisdiction over foreign sovereigns (Pet. App. 9a-10a). In so doing, the court noted the legislative history stating that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity" (*id.* at 11a (quoting H.R. Rep. 94-1487, *supra*, at 12)), the Second Circuit's own prior conclusion that the FSIA "insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act" (Pet. App. 11a, quoting *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d 115, 116 (2d Cir.), cert. denied, 469 U.S. 1086 (1984)), and this Court's "similar views" in *Verlinden* (Pet. App. 11a, citing 461 U.S. at 496-497). But the court chose not to follow those pronouncements in this case, because it believed that "Congress was not focusing on violations of international law when it enacted the FSIA" and therefore "did not intend to remove existing remedies in United States courts [under the Alien Tort Statute] for violations of international law of the kind presented here" (Pet. App. 11a). Indeed, the court believed that to construe the FSIA to bar this suit against a foreign state under the Alien Tort Statute would actually frustrate Congress's purpose in enacting the FSIA, because the "central premise" of the FSIA was that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law" (*id.* at 13a, quoting H.R. Rep. 94-1487, *supra*, at 14 (emphasis added by the court)).⁴

⁴ The court of appeals also held that the actions of Argentina alleged by respondents were "sufficiently related" to the United States to fall within

b. Judge Kearse dissented (Pet. App. 18a-21a). Judge Kearse expressed skepticism that the Alien Tort Statute was "intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of 'evolving standards of international law'" (*id.* at 19a (citation omitted)). But however that may be, she concluded, the majority had improperly disregarded the "clearly restrictive provisions" of the FSIA, which, in her view, were "intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns" (*ibid.* (quoting H.R. Rep. 94-1487, *supra*, at 12)).

ARGUMENT

The decision of the court of appeals is flatly inconsistent with the text and legislative history of the Foreign Sovereign Immunities Act and with this Court's decision in *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983), which make clear that the FSIA prescribes the exclusive standards for determining when a foreign state is immune from the jurisdiction of United States courts. The decision below also conflicts with the decisions of other courts of appeals regarding the exclusivity of the FSIA. For these reasons alone, review by this Court is warranted. In addition, however, the decision of the court of appeals may have substantial adverse foreign policy consequences for the United States, because it subjects a foreign state to suit in the courts of this country based on incidents occurring on the high seas in time of war and because it threatens more broadly to open the courts of the United States to claims by aliens against foreign governments where the underlying dispute has no nexus to the United States. Especially in light of these potential foreign relations consequences, we urge the Court to grant the petition for a writ of certiorari.

I. The text and legislative history of the FSIA expressly provide that the FSIA is the exclusive means for assessing claims by

constitutional limitations on the exercise of personal jurisdiction over a foreign defendant (Pet. App. 14a-15a).

foreign states to sovereign immunity from the jurisdiction of the courts of the United States.

a. In the FSIA's statement of findings and declaration of purpose, Congress expressed its determination that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [28 U.S.C. 1602-1611]." 28 U.S.C. 1602. This statement obviously manifests a congressional intention that, from 1976 on, the provisions of the FSIA would constitute the comprehensive and sole set of standards governing judicial determinations of foreign sovereign immunity.

Consistent with this overriding purpose, Section 1604 states a general and universal rule that foreign states are entitled to immunity, subject only to the exceptions set forth in the FSIA itself. Section 1604 provides that "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of this Act[,] a foreign state *shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter*" (emphasis added). Section 1605 in turn specifies in detail the exceptions to this general rule of immunity.³ Section

³ The exceptions are cases: in which the foreign state has waived its immunity (28 U.S.C. 1605(a)(1)); in which the action is based on commercial activities in the United States, an act committed in the United States in connection with commercial activities elsewhere, or commercial activities outside the United States having an effect within (28 U.S.C. 1605(a)(2)); in which property was taken in violation of international law and the property is present in the United States in connection with commercial activity of a foreign state or is owned by an agency or instrumentality of the foreign state that is engaged in commercial activities in the United States (28 U.S.C. 1605(a)(3)); in which the dispute concerns rights in immovable property in the United States that was acquired by gift or succession (28 U.S.C. 1605(a)(4)); and (with certain exceptions) cases in which money damages are sought for personal injury or death, or damage to or loss of property, occurring in the United States and caused by an act or omission of the foreign state or one of its officers or employees acting in his official capacity (28 U.S.C. 1605(a)(5)). In addition, under 28 U.S.C. 1605(b), a foreign state is not immune from suit in an admiralty action to enforce a maritime lien against a vessel or cargo of the foreign state, if the lien is based on commercial activities of that state.

1606 prescribes the extent of a foreign state's liability when it is not entitled to immunity, and Section 1607 permits certain counterclaims against a foreign state that brings an action in a court of the United States or a State.⁴ Sections 1604 to 1607 thus prescribe what Section 1602 presages: a comprehensive and self-contained statutory scheme for the regulation of foreign sovereign immunity.

This interpretation of the substantive immunity provisions of the FSIA is reinforced by the special grant of subject matter jurisdiction in 28 U.S.C. 1330, which is entitled "Actions against foreign states" and was added to the Judicial Code by Section 2(a) of the FSIA, 90 Stat. 2891. Section 1330(a) provides that "[t]he district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state * * * as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement."⁵ Sections 1330(a) and

⁴ Section 1604 also provides that the general rule of immunity is "[s]ubject to existing international agreements to which the United States [was] a party at the time of enactment of [the FSIA] * * *." This exception has no relevance here. It applies only if the international agreement addresses amenability to suit and directly conflicts with the immunity provisions of the FSIA. H.R. Rep. 94-1487, *supra*, at 10, 17-18; S. Rep. 94-1310, *supra*, at 6, 17. Respondents sought to rely on this provision in the court below, citing the Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, and the Pan American Convention Relating to Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989. See Appellants' C.A. Br. 41-45. However, those conventions merely establish certain substantive rules of conduct and state that compensation shall be paid for certain wrongs; they do not address the distinct question of one sovereign state's immunity to the jurisdiction of the courts of another sovereign state. Moreover, although the United States is a party to both conventions, Argentina is merely a signatory. We doubt that Section 1604 was intended to dispense with the immunity of a foreign state based on an "agreement" to which the foreign state is not a party.

⁵ Subsection (b) of 28 U.S.C. 1330 provides that "[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction under subsection (a) where service has been made under [28 U.S.C. 1608]." Thus, the existence of both subject

1604 are complementary: Section 1330(a) confers jurisdiction on the federal courts whenever the foreign state *is not* entitled to immunity, and Section 1604 bars the district courts from exercising jurisdiction wherever the foreign state *is* entitled to immunity. These two provisions of the FSIA therefore occupy the entire fields of foreign sovereign immunity and subject matter jurisdiction over suits against foreign states. There is no room in this framework for a court to fashion its own standards of foreign sovereign immunity that depart from those in the FSIA or to exercise jurisdiction over a suit against a foreign state where jurisdiction does not lie under 28 U.S.C. 1330(a).

It is clear in this case that petitioner Argentine Republic is immune from suit under 28 U.S.C. 1604 and that jurisdiction over this action therefore does not lie under 28 U.S.C. 1330(a). As the district court held (Pet. App. 30a-31a), none of the exceptions in 28 U.S.C. 1605 to the general rule of sovereign immunity is applicable here. There is only one exception permitting suits sounding in tort, and that exception is limited to actions "in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States" (28 U.S.C. 1605(a)(5) (emphasis added)).⁹ Because the damage to and loss of property that

matter and personal jurisdiction turn on the substantive immunity provisions of the Act. *Verlinden*, 461 U.S. at 485, 489 & n. 14. Although the FSIA contemplates that a suit may be brought against a foreign sovereign in state court, the FSIA guarantees foreign sovereigns the right to remove any civil action from a state court to a federal court. *Id.* at 489; see 28 U.S.C. 1441(d).

⁹ The legislative history of the FSIA further indicates that the tort exception applies only if the act or omission of the foreign state or its officer or employee occurred within the jurisdiction of the United States. See H.R. Rep. 94-1487, *supra*, at 21; S. Rep. 94-1310, *supra*, at 20. Several courts of appeals have interpreted this legislative history to require that the act or omission occur in the United States. See *Prolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 379 (7th Cir. 1985); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1524-1525 (D.C. Cir. 1984), cert. denied, 470 U.S. 1051 (1985); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 842-843 (D.C. Cir.), cert. denied, 469 U.S. 881 (1984); cf. *Oben v. Government of Mexico*, 729 F.2d 641, 645-646 (9th Cir.), cert. denied, 469 U.S. 917 (1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 589-590 n.10 (9th Cir. 1983), cert. denied, 469

respondents allege occurred outside the United States—on the high seas, in the South Atlantic—the exception in 28 U.S.C. 1605(a)(5) is inapplicable. Petitioner Argentine Republic therefore is entitled to the immunity from the jurisdiction of the courts of the United States that is conferred by 28 U.S.C. 1604.

b. The legislative history is equally unambiguous. The House and Senate Reports both state that the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States," and that the FSIA "is intended to preempt any other State or Federal law (excluding applicable international agreements) for according immunity to foreign sovereigns, their political subdivisions, their agencies, and their instrumentalities" (H.R. Rep. 94-1487, *supra*, at 12; S. Rep. 94-1310, *supra*, at 11). The House and Senate Reports also make clear that "Section 1330 provides a comprehensive jurisdictional scheme in cases involving foreign states," which is essential because disparate treatment "may have adverse foreign relations consequences" (H.R. Rep. 94-1487, *supra*, at 12-13; S. Rep. 94-1310, *supra*, at 12). Similar points are stressed throughout the legislative history.⁹

U.S. 880 (1984). See also *Verlinden*, 461 U.S. at 488 n.11 (referring to 28 U.S.C. 1605(a)(5) as providing an exception "for certain noncommercial torts within the United States").

⁹ See S. Rep. 94-1310, *supra*, at 1 (the FSIA "define[s] the jurisdiction of United States courts in suits against foreign states, [and] the circumstances in which foreign states are immune from suit"); *id.* at 8 (the purpose of the FSIA "is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity"); *ibid.* (prior to enactment of the FSIA, there were no "comprehensive provisions in our law available to inform parties when they can have recourse to the courts to assert a legal claim against a foreign state" and no "firm standards as to when a foreign state may validly assert the defense of sovereign immunity"); *id.* at 12 (the FSIA "set[s] forth comprehensive rules governing sovereign immunity" and "prescribes . . . the jurisdiction of U.S. district courts in cases involving foreign states"); *id.* at 14 (the FSIA "sets forth the legal standards under which Federal and States courts would henceforth determine all claims of sovereign immunity raised by foreign states"). Accord, H.R. Rep. 94-1487, *supra*, at 1, 6, 7, 14.

c. The court of appeals' attempt to justify the exercise of jurisdiction under the Alien Tort Statute in circumstances where petitioner is immune from suit under the FSIA is completely without merit. Indeed, the court of appeals acknowledged that the legislative history of the FSIA, this Court's decision in *Verlinden*, and its own prior decision in *O'Connell* all support the view that the FSIA is "the sole basis for United States jurisdiction over foreign sovereigns" (Pet. App. 11a). The court concluded, however, that because the FSIA provides exceptions to sovereign immunity primarily for commercial disputes, "Congress was not focusing on violations of international law when it enacted the FSIA" (*ibid.*). The court therefore decided that the FSIA should not be construed to remove what the court found to be a pre-existing remedy under the Alien Tort Statute for violations of international law.

The first flaw in this analysis is the court of appeals' assumption that, at the time the FSIA was enacted, the Alien Tort Statute provided a remedy against a foreign state. As the district court pointed out (Pet. App. 32a), the Alien Tort Statute makes no mention of foreign states, or indeed of any other class of defendants. It simply refers to plaintiffs and the nature of the cause of action over which the district courts have jurisdiction. In light of this Court's decision in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), holding that a foreign sovereign was absolutely immune from suit in the courts of the United States, it seems clear that a foreign state would not have been subject to suit under the Alien Tort Statute when it was enacted in 1789. In fact, the court of appeals did not cite any case decided prior to the enactment of the FSIA in which a court exercised jurisdiction under the Alien Tort Statute over an in personam action against a foreign sovereign, and we are not aware of any such case.¹⁰ There accordingly is no basis for concluding that Congress must have intended to preserve a remedy that had never been recognized by the courts. Compare

¹⁰ The only case in which jurisdiction was exercised over a foreign state under the Alien Tort Statute was decided long after the FSIA was enacted. *Von Dardel v. Union of Soviet Socialist Republics*, 623 F. Supp. 246 (D.D.C. 1985) (default judgment; alternative holding).

Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 378-382 (1982).¹¹

¹¹ On a related issue not before the Court, the United States has argued that the Alien Tort Statute was not intended to authorize the courts of the United States to recognize and entertain causes of action by aliens based on violations of the law of nations committed by citizens of foreign nations (much less by the foreign nations themselves) outside the United States. Section 1350 confers jurisdiction over actions for torts in violation of "the law of nations or a treaty of the United States." The United States has argued in its amicus brief in *Trajanov v. Marcos*, No. 86-2448, which is pending in the Ninth Circuit, that Section 1350 was intended to confer jurisdiction over cases seeking redress for violations of the law of nations for which other nations might regard the United States as accountable and which therefore might embroil the United States in an international controversy if redress was not afforded. Such violations would principally include those committed in the United States (e.g., the celebrated incident of an assault on the French Minister discussed in *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 111 (Pa. Oyer & Terminer 1784); compare 18 U.S.C. 112) and perhaps certain violations committed outside the United States but by persons subject to its jurisdiction. Under this construction, an assault by a British citizen on the French Minister in Great Britain (or an attack by a foreign nation on a neutral ship on the high seas) would not give rise to a cause of action cognizable in the federal courts under the Alien Tort Statute, because the incident would not give rise to any international responsibility on the part of the United States.

This interpretation of the Alien Tort Statute is supported by the background of the Law of Nations Clause of the Constitution, which confers on Congress the power to "define and punish . . . Offences against the Law of Nations" (Art. I, § 8, Cl. 10). This provision was included in the Constitution in response to the absence of any power in the Continental Congress to punish offenses against the Law of Nations and thereby to prevent incidents by the States or their people from embroiling the Nation with foreign nations. See *The Federalist* No. 3 (Jay), at 43-44 (C. Rossiter ed. 1961); *id.*, No. 42 (Madison), at 265; cf. *id.*, No. 80 (Hamilton), at 476. This interpretation also is supported by the text of 28 U.S.C. 1350 itself, which provides jurisdiction over suits based on a tort "committed in violation of . . . a treaty of the United States" (emphasis added). The quoted language suggests that a suit will lie only where there is an alleged violation of an international obligation undertaken by the United States.

The United States also has taken the position in the *Trajanov* case in the Ninth Circuit that because the Alien Tort Statute (like the federal question statute) is only jurisdictional in nature, it does not create a cause of action in favor of an alien for a violation of the law of nations. In this case, there is a serious question whether a federal court may properly "imply" such a cause of action against a foreign sovereign based on conduct that occurred outside the United

In any event, even if respondents might have had a cause of action against petitioner under the Alien Tort Statute prior to the enactment of the FSIA in 1976, the text and legislative history of the FSIA now make clear, as we have explained above, that the FSIA is the exclusive basis for the exercise of jurisdiction and resolution of claims of sovereign immunity.¹² The court of appeals nevertheless believed that the Alien Tort Statute should continue as an independent basis of jurisdiction because Congress did not focus on violations of international law when it enacted the FSIA (Pet. App. 11a). However, the lack of specific discussion of one subpart of a subject in the legislative history is no basis for excluding that subpart from the coverage of a statute that is both written and described in its legislative history in all-embracing terms.

Moreover, the court of appeals was wrong in believing that Congress did not focus on violations of international law. The FSIA expressly provides an exception to the rule of foreign sovereign immunity where the suit involves rights in property that was taken "in violation of international law" (28 U.S.C.

States. See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-808 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) (Bork, J. concurring). The Second Circuit, however, took an expansive view of the reach of the Alien Tort Statute in *Filartiga v. Pena-Irala*, 630 F.2d 876 (1980), upon which the Second Circuit relied in this case (Pet. App. 5a, 7a-8a). Although the United States filed an amicus brief in support of the plaintiffs in *Filartiga*, the United States has taken the position in *Trajano* that the plaintiffs in *Filartiga* did not have a cause of action cognizable under the Alien Tort Statute.

¹² The language of 28 U.S.C. 1330(a) makes it especially clear that it comprehensively addresses the question of subject matter jurisdiction over suits against foreign states, because it confers jurisdiction on the district courts over "any . . . civil action against a foreign state" for which the foreign state is not entitled to immunity (emphasis added). Indeed, precisely because of the all-encompassing scope of the new 28 U.S.C. 1330(a), the FSIA deleted the references to "foreign states" that then were contained in the diversity statute, 28 U.S.C. (1970 ed.) 1332(a)(2) and (3). FSIA, § 3, 90 Stat. 2891. As the House Report explained, "[s]ince jurisdiction in actions against foreign states is comprehensively treated by the new section 1330, a similar jurisdictional basis under section 1332 becomes superfluous" (H.R. Rep. 94-1487, *supra*, at 14; accord, S. Rep. 94-1310, *supra*, at 10). There is no reason to believe that Congress contemplated a different result with respect to the Alien Tort Statute.

1605(a)(3)). Congress's express provision for certain suits based on violations of international law indicates that other such suits that are not expressly permitted are barred. Cf. *United States v. Erika, Inc.*, 456 U.S. 210, 208 (1982). There is no reason to suppose that Congress would have intended any other result in the circumstance of this case, because the action of the military forces of a foreign state, even if in violation of international law, are unquestionably sovereign or public acts, for which the state is immune from suit. *Victory Transport, Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 360 (2d Cir. 1964), cert. denied, 381 U.S. 934 (1954).

In addition, as this Court observed in *Verlinden* (461 U.S. at 493 n.19), when it enacted the comprehensive provisions of the FSIA, Congress relied in part on its authority under the Constitution to define offenses against the "Law of Nations" (Art. I, § 8, Cl. 10). See H.R. Rep. 94-1487, *supra*, at 12. It follows that Congress intended the FSIA to be comprehensive with respect to suits against foreign states based on violations of the Law of Nations (international law), and did not intend to permit different jurisdictional and immunity rules to be applied in a suit for a violation of the "law of nations" under 28 U.S.C. 1350.

This case therefore is directly analogous to *Block v. North Dakota*, 461 U.S. 273 (1983), which involved a question of the sovereign immunity of the United States to suit. There, the Court held that whatever the uncertainty prior to the 1972 enactment of the Quiet Title Act (QTA), 28 U.S.C. 2409a, regarding the availability of an "officer's suit" or review under the Administrative Procedure Act to challenge the United States' claim of title to real property, the QTA is now the exclusive avenue for such challenges. Otherwise, the Court observed, "all of the carefully crafted provisions of the QTA deemed necessary for the protection of the national public interest"—including the provisions of the QTA that preserve the United States' sovereign immunity against certain suits—"could be averted" (461 U.S. at 284-285). Similarly here, if the FSIA does not displace whatever jurisdiction might once have existed under the Alien Tort Statute over suits against foreign states, all

of the carefully crafted provisions of the FSIA that preserve the sovereign immunity of foreign states could be averted.

2. Consistent with the text and legislative history of the FSIA, this Court in *Verlinden* explained that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities" (461 U.S. at 488 (emphasis added)) and that "if a court determines that none of the exceptions to sovereign immunity applies, the plaintiff will be barred from raising his claim in any court in the United States" (*id.* at 497).¹³ The decision of the court of appeals cannot be reconciled with *Verlinden*.

The other courts of appeals likewise have taken the position that the FSIA contains the exclusive standards for resolving claims of sovereign immunity by foreign states. See, e.g., *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 919 (D.C. Cir. 1987); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1493 (11th Cir. 1986), cert. denied, No. 86-909 (Mar. 9, 1987); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 35 (3d Cir. 1985); *Yugoexport, Inc. v. Thai Airways International, Ltd.*, 749 F.2d 1373, 1375 (9th Cir. 1984), cert. denied, 471 U.S. 1101 (1985); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370,

¹³ Similar observations pervade the Court's opinion in *Verlinden*. See 461 U.S. at 489 ("if the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction"); *id.* at 493 (the FSIA "comprehensively regulat[es] the amenability of foreign nations to suit in the United States"); *id.* at 493-494 ("The [FSIA] must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a). At the threshold of every action in a district court against a foreign state, therefore, the court must satisfy itself that one of the exceptions applies – and in doing so it must apply the detailed federal law standards set forth in the Act."); *id.* at 495 n.22 (quoting H.R. Rep. 94-1487, *supra*, at 12 ("the Act's purpose is to set forth 'comprehensive rules governing sovereign immunity'")); *id.* at 496 (same); *ibid.* ("[T]he jurisdictional provisions of the Act are simply one part of this comprehensive scheme."); *id.* at 496-497 ("The Act thus does not merely concern access to the federal courts. Rather, it governs the types of actions for which foreign sovereigns may be held liable in a court in the United States, federal or state.");

372 (7th Cir. 1985). In fact, the Second Circuit had adhered to that view prior to its decision in this case. See, e.g., *O'Connell Machinery Co. v. M.V. Americana*, 734 F.2d at 116. Moreover, the other courts of appeals that have considered the question have uniformly held that a plaintiff cannot circumvent the limitations in the FSIA on suits against a foreign sovereign by invoking jurisdictional provisions other than 28 U.S.C. 1330(a), such as the grants of federal-question and diversity jurisdiction in 28 U.S.C. 1331 and 1332. *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 420-422 (5th Cir. 1982); *REX v. CIA. Pervana de Vapores, S.A.*, 660 F.2d 61, 64-65 (3d Cir. 1981); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981), cert. denied, 455 U.S. 982 (1982); *Ruggiero v. Compania Peruana de Vapores*, 639 F.2d 872, 875-876 (2d Cir. 1981). And of particular relevance here, the District of Columbia Circuit held in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), that the FSIA barred the district court from exercising jurisdiction over a tort suit against a foreign sovereign, even though the plaintiffs invoked the district court's jurisdiction under the Alien Tort Statute. See 726 F.2d at 776 n.1 (Edwards, J., concurring); *id.* at 805 n.13 (Bork, J., concurring). The conflict between the decision below and the decisions of other courts of appeals regarding the exclusivity of the FSIA warrants resolution by this Court.

3. The decision of the court of appeals could have a substantial adverse impact on the foreign relations of the United States. The courts of the United States are not the proper forums for the resolution of the legality of acts of foreign states, except to the extent permitted by controlling laws of the United States – here, the FSIA, in which Congress defined and codified what it regarded as the appropriate standards of the international law of sovereign immunity. The United States does not condone violations of international law, and the United States takes the position that petitioner Argentine Republic should take responsibility for any such violations that it committed in its territory or on the high seas during the war with Great Britain. But sensitive foreign policy concerns are implicated by the

court of appeals' holding that the courts of the United States may assume responsibility for determining whether such a violation occurred in this case and for awarding damages against petitioner ~~if~~ ~~finds~~ a violation. *is found*.

The decision below not only has the extraordinary effect of requiring petitioner to answer to the courts of a neutral third party regarding its conduct during a time of war.¹⁴ It also threatens to turn the courts of the United States into tribunals in which aliens generally (but not U.S. citizens) may seek redress against foreign governments for conduct that has no substantial nexus to the United States. As this Court observed in *Verlinden*, "Congress was aware of concern that 'our courts [might be] turned into small "international courts of claims[,] . . . open . . . to all comers to litigate any dispute which any private party may have with a foreign state anywhere in the world.'" 461 U.S. at 490 (citation omitted). And as this Court further observed, "Congress protected against this danger * * * by enacting substantive provisions requiring some form of substantial contact with the United States. See 28 U.S.C. § 1605." 461 U.S. at 490 (footnote omitted). The court of appeals failed to respect those substantive limitations here. In addition, the assertion of jurisdiction against a foreign state in these circumstances will expose the United States to charges by foreign governments that such action is inconsistent with the international law and practice of sovereign immunity. Such proceedings could result in retaliatory actions against the United States in the Courts of other Nations.

¹⁴ It is instructive that the United States would be immune from a suit in its own courts seeking money damages for the conduct at issue here. The Federal Tort Claims Act expressly does not permit a suit based on "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war" (28 U.S.C. 2680(j)). It is implausible to suppose that Congress nevertheless intended to subject a foreign nation to such suits in the courts of the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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